Supreme Court, U.S.
FILED
FEB 11 1991
OFFICE OF THE CLERK

(2)

No. 90-1144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BIRENDRA MOHAN SHARMA, ASTRAL HOLDING CORPORATION, FREESIA SHIPPING CORPORATION, SUN LILY MARITIME INC., DOMAN TANKERS INC., and ZODIAC FINANCE CORPORATION,

Petitioners,

– against –

SKAARUP SHIP MANAGEMENT CORPORATION, OLE SKAARUP, and CHEMICAL BANK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT CHEMICAL BANK'S BRIEF IN OPPOSITION

HENRY LEWIS GOODMAN
Counsel of Record for Respondent Chemical Bank
750 Third Avenue
New York, New York 10017
(212) 682-6900

Of Counsel:
MARGOT B. SCHONHOLTZ
ZALKIN, RODIN & GOODMAN

QUESTIONS PRESENTED

1. In a diversity action, where:

(a) a trial court makes a pretrial ruling, on the eve of a jury trial in a private commercial contract dispute, to exclude evidence with respect to a measure of damages under state law and does not dismiss any of Petitioners' claims; and

(b) as a consequence of that evidentiary ruling, Petitioners request the entry of a final judgment dismissing all of their claims, concluding that no possible recovery is left to them on their affirmative claims;

are the purported questions of federal law presented by the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit (the "Second Circuit") academic and wholly without foundation?

2. Where the United States District Court for the Southern District of New York (the "District Court") and the Second Circuit agreed upon the proper application of principles of New York substantive law in respect of the proper measure of damages in a breach of contract action between private parties, does the determination of that issue present a question of law which should be reviewed by this Court?

CERTIFICATION PURSUANT TO RULE 29.1 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

Respondent Chemical Bank has no subsidiaries other than wholly-owned subsidiaries. Chemical Bank is a wholly-owned subsidiary of Chemical Banking Corporation ("CBC"). CBC has numerous other wholly-owned subsidiaries, which are affiliates of Chemical Bank.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CERTIFICATION PURSUANT TO RULE 29.1 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
RULES INVOLVED	3
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	11
REASONS FOR DENYING THE WRIT	11
1. Since the District Court Did Not Grant Summary Judgment to Chemical, the Questions Presented by the Petition are Academic and Without Foundation	11
2. The Pivotal Ruling of the Second Circuit On a Matter of State Law Was Clearly Correct	14
3. The Petition Does Not Present An Important Question of Federal Law	15
CONCLUSION	16

TABLE OF AUTHORITIES

Cases Cited	Page
Albany Insurance Co. v. Bengal Marine, Inc., 857 F.2d 250 (5th Cir. 1988)	14
American List Corp. v. U.S. News and World Report, Inc., 75 N.Y.2d 38, 549 N.E.2d 1161, 550 N.Y.S.2d 590 (1989)	15
American Machine & Metals, Inc. v. De Bothezat Impeller Co., 82 F.Supp. 556 (S.D.N.Y. 1949), *aff'd*, 180 F.2d 342 (2d Cir.), *cert. denied*, 339 U.S. 979 (1950)	13
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)	16
Baskett v. United States, 2 Cl. Ct. 356, *aff'd*, 790 F.2d 93 (Fed. Cir. 1986)	13
Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980)	13
Bishop v. Wood, 426 U.S. 341 (1976)	15
Brobst v. Columbus Services International, 761 F.2d 148 (3d Cir. 1985), *cert. denied*, 483 U.S. 1043 (1988)	12
Butner v. United States, 440 U.S. 48 (1979)	15
Celotex Corp. v. Catrett, 477 U.S. 317 (1986)	16
DiMillo v. Sheepscot Pilots, Inc., 870 F.2d 746 (1st Cir. 1989)	14

Page

Gilbert v. Pan American World Airways, Inc., No. 85-4157 (S.D.N.Y. Feb. 23, 1989 and July 8, 1988) 13

King Fisher Marine Service Inc. v. N.P. Sunbonnet, 724 F.2d 1181 (5th Cir. 1984) 14

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 16

Life Music, Inc. v. Broadcast Music, Inc., 31 F.R.D. 3 (S.D.N.Y. 1962) 13

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 15

Miller v. New York Produce Exchange, 550 F.2d 762 (2d Cir.), *cert. denied*, 434 U.S. 823 (1977) 13

New Orleans v. New Orleans Waterworks Co., 142 U.S. 79 (1891) 12

North American Foreign Trading Corp. v. Direct Mail Specialist, 697 F.Supp. 163 (S.D.N.Y. 1988) 13

Proteus Books Ltd. v. Cherry Lane Music Co., 873 F.2d 502 (2d Cir. 1989) 13

Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949) 15

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955) 12, 16

Page

Salem v. United States Lines Co., 370 U.S. 31 (1962) 13

Schuman v. Mezzetti, 702 F.Supp. 52 (E.D.N.Y. 1988) 13

Sharma v. Chemical Bank, 723 F.Supp. 200 (S.D.N.Y. 1989) 2, 7

Sharma v. Skaarup Ship Management Corp., 916 F.2d 820 (2d Cir. 1990) ..... 2, *passim*

Sharma v. Skaarup Ship Management Corp., 699 F.Supp. 440 (S.D.N.Y. 1988) 2, 7

The Umbria, 166 U.S. 404 (1896) 14

United States Football League v. National Football League, 634 F.Supp. 1155 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988) 13

United States v. S.A. Empresa de Viacao Aerea Rio Grandense, 467 U.S. 797 (1984) 15

White Mountain Apache Tribe v. United States, 10 Cl. Ct. 115 (1986) 13

Yale Transport Corp. v. Yellow Truck & Coach Mfg. Co., 3 F.R.D. 440 (S.D.N.Y. 1944) 13

Rules

Fed.R.Civ.P. 8(a) 7

Fed.R.Civ.P. 16 ..... 3, *passim*

Fed.R.Civ.P. 54(b) 2, 10, 12

McKinney's Revised 1990 New York Rules of Court §500.17(b) 10

No. 90-1144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BIRENDRA MOHAN SHARMA, ASTRAL HOLDING CORPORATION, FREESIA SHIPPING CORPORATION, SUN LILY MARITIME INC., DOMAN TANKERS INC., and ZODIAC FINANCE CORPORATION,

Petitioners,

— against —

SKAARUP SHIP MANAGEMENT CORPORATION, OLE SKAARUP, and CHEMICAL BANK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT CHEMICAL BANK'S BRIEF IN OPPOSITION

Respondent Chemical Bank ("Chemical"), appellee below, respectfully requests that this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit (the "Petition"), seeking review of the opinion of the Second Circuit entered in this case on October 17, 1990.

OPINIONS BELOW

The opinion of the Second Circuit is reported at 916 F.2d 820 and is attached to the Petition as Appendix A (A1-20).[1]

By their description of the oral rulings of the District Court (and their condensed version of those rulings, set forth in Appendix D to the Petition), Petitioners obscure the fact that they *requested* entry of a final judgment dismissing all of their claims the day after the District Court made rulings excluding certain evidence (JA1631-43, 1644-65, 916 F.2d at 824).[2]

Petitioners also fail to include published opinions of the District Court during the course of the proceedings below. The District Court entered an Opinion and Order, dated October 13, 1988, reported as *Sharma v. Skaarup Ship Management Corp.*, 699 F.Supp. 440 (S.D.N.Y. 1988) ("*Sharma I*"), and a Memorandum, dated October 10, 1989, reported as *Sharma v. Chemical Bank*, 723 F.Supp. 200 (S.D.N.Y. 1989) ("*Sharma II*").

JURISDICTION

In this diversity action, the District Court ruled *in limine*, at the final pretrial conference on the eve of a jury trial, that Petitioners' proposed measure of damages, to be applied as a matter of law in a breach of contract action, was improper (JA1636-37). Petitioners concluded that the District Court's ruling eliminated any possible recovery on their claims (JA1654) and therefore, requested the District Court to enter a final judgment dismissing all of their claims, pursuant to Fed.R.Civ.P. 54(b) (JA1648, 1654).

Petitioners appealed from the final judgment they requested, asserting, as errors of law, the *in limine* ruling on the measure

---

[1] Letters in parentheses followed by numerals refer to pages in the appendices annexed to the Petition.

[2] Numerals in parentheses preceded by "JA" refer to pages in the Joint Appendix filed in the Second Circuit.

of damages and other rulings made during the course of the proceedings below (JA1914-23). On October 17, 1990, the Second Circuit affirmed the judgment below, ruling that Petitioners' proposed measure of damages was improper as a matter of New York State law (A11-17, 916 F.2d at 825-27) and that Petitioners' claims of procedural error were moot (A20, 916 F.2d at 828).

By a petition for rehearing (with a suggestion for rehearing *en banc*), Petitioners sought the Second Circuit's reconsideration of its determinative ruling on the measure of damages under state law. The petition for rehearing was denied by order entered on November 30, 1990 (E1-2).

RULES INVOLVED

Chemical respectfully refers this Court to the following:

Fed.R.Civ.P. 16:

> (a) PRETRIAL CONFERENCES; OBJECTIVES. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as
>
> (1) expediting the disposition of the action;
>
> * * *
>
> (3) discouraging wasteful pretrial activities;
>
> * * *
>
> (c) SUBJECTS TO BE DISCUSSED AT PRETRIAL CONFERENCES. The participants at any conference under this rule may consider and take action with respect to
>
> (1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

* * *

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, *and advance rulings from the court on the admissibility of evidence*;

(4) *the avoidance of unnecessary proof and of cumulative evidence*;

* * *

(11) such other matters as may aid in the disposition of the action.

(Emphasis added.)

STATEMENT OF THE CASE

This is an action against Chemical for alleged breach of a 1984 settlement agreement between Petitioners and Chemical, that was amended and extended three times (collectively, the "Settlement Agreement") (JA188-207).

Between 1977 and 1981, Chemical extended secured financing to Petitioners Freesia Shipping Corp., Sun Lily Maritime Inc. and Doman Tankers Inc., in a principal sum exceeding $35,000,000, to finance their purchase of three tankers (the "Vessels") (JA21-23, 916 F.2d at 821-22). The entire indebtedness to Chemical was secured by, among other things, first ship mortgages on the Vessels and was personally guaranteed by Petitioner Birendra Mohan Sharma ("Sharma"), the president of the corporate owners of the Vessels (JA189-90, 266, 301, 524-26, 1368-71, 916 F.2d at 821-22).

By October 1981, Petitioners defaulted in the payment of the principal of their loans (JA23, 443, 916 F.2d at 821). By September 1983, Petitioners also defaulted on the interest payments due to Chemical (JA443, 507, 916 F.2d at 821-22).

In late August 1984, when Petitioners' long overdue obligations to Chemical exceeded $30,000,000 (JA189-90, 1607, 916 F.2d at 822), Chemical began to enforce its contractual rights to take possession of the Vessels (JA37, 916 F.2d at 822). On September 8, 1984, Petitioners obtained an *ex parte* stay of foreclosure from an English court (JA302, 437-41, 916 F.2d at 822). Chemical applied, the following day, for a discharge of that injunction (JA302, 916 F.2d at 822).

On September 12, 1984, in order to address Petitioners' long-standing default in their obligations to Chemical and to avoid protracted litigation, the parties entered into the Settlement Agreement (JA189-99, 302, 418).

The Settlement Agreement reduced Petitioners' past-due debt to Chemical to $16,500,000 (approximately one-half of the amount outstanding at that time) and released Sharma from his personal guarantee under certain conditions (JA190-94, 916 F.2d at 822).[3] The Settlement Agreement further provided that the debt, as reduced, was to be fully discharged by either: (a) surrender of the Vessels; or (b) payment of the reduced debt, in full, within fifty-six days, with a commitment to refinance to be provided to Chemical within twenty-eight days (JA190-94, 196-98, 263-65, 268, 302, 444, 895-901, 1606-08).[4] In return, Petitioners, among other things, released any claims they had against Chemical arising prior to September 12, 1984 (JA196, 916 F.2d at 822).[5]

---

[3] Petitioners incorrectly state that, at any time after execution of the agreement, they "could have simply walked away and achieved the same result – the release of their obligations in return for surrender of the ships" (Petition at p.30; *see also* JA194).

[4] If Petitioners either failed to produce a binding commitment letter from a financial institution acceptable to Chemical or failed to pay the amount due under the Settlement Agreement in a timely manner, Chemical was entitled to call for the delivery of bills of sale to the Vessels from an escrow holder and to register the Vessels in the name of its three nominee corporations (JA190-94, 264-65, 302, 444, 916 F.2d at 822).

[5] Petitioners also agreed that they would not, without Chemical's consent, encumber the Vessels with any charter of a duration longer than three months

(Footnote continued)

When Petitioners could not obtain refinancing within the time prescribed in the Settlement Agreement, Chemical granted three further extensions and again reduced the amount of Petitioners' principal indebtedness (JA200-07, 268-69, 302-03, 916 F.2d at 822-23). Petitioners failed to procure refinancing before the final extension expired on April 1, 1985 (JA205-07, 209-10, 265, 303, 1608, 916 F.2d at 823).

Following Petitioners' failure to perform under the Settlement Agreement, Chemical called for delivery of the bills of sale to the Vessels from the escrow holder (JA303). Petitioners then sought their second *ex parte* injunction in the English courts to restrain the transfer of the Vessels to Chemical's nominees (JA301, 303-04).

The Supreme Court of Judicature Court of Appeals (Civil Division) (the "High Court of Appeals") affirmed the discharge of the *ex parte* injunction obtained by Petitioners, thereby enabling Chemical to transfer title to the Vessels to its nominees (JA300-08). In its opinion, the High Court of Appeals characterized the litigation as "a misconceived action and a misconceived appeal" and stated that the Petitioners were "boldly and baldly" asking the High Court of Appeals to "do for them what the bank [was] finally no longer willing to do and in no way obliged to do" (JA300, 304-05).

Title to the Vessels was transferred to Chemical's nominees on April 26, 1985 (JA445, 916 F.2d at 823). Ten days prior to the transfer, Petitioners obtained two valuations for the three Vessels which ranged from $14,800,000 to $15,200,000 in the aggregate (JA224-25, 1248, 1252, 1255, 1654). In 1986, Chemical's nominees sold the Vessels for a total of $14,000,000 (JA633, 916 F.2d at 823).

(JA197, 916 F.2d at 822). The Settlement Agreement further provided for the termination of the pending litigation in England, Chemical's discontinuance of its foreclosure proceedings, the release of the Vessels from prior arrests and seizures, Chemical's withdrawal of the default demand notices served on Petitioners, the operation and maintenance of the Vessels while they remained in Petitioners' possession for the next month, payment of trade debt incurred by the Vessels, and payment by Petitioners to Chemical of $2,000 per day per Vessel in lieu of interest on the outstanding indebtedness (JA194-96, 268).

The instant action was commenced in April 1986 (JA2). During the first three years of the proceedings below, Chemical moved against successive defective complaints which contained claims that were insufficient as a matter of law, patently failed to comply with the Fed.R.Civ.P. 8(a) and were barred by the express general release (the "Release") granted by Petitioners in the Settlement Agreement (JA316-18, 1633).[6]

The claims remaining to Petitioners were enumerated in *Sharma I*, 699 F.Supp. at 450 and were asserted in Petitioners' Fourth Amended Complaint (JA442-64, 524-37).[7] The Fourth Amended Complaint claimed damages in excess of $60,000,000 for loss of the Vessels and alleged breaches by Chemical of: (i) an express contractual obligation to act reasonably and in good faith; (ii) an implied duty of good faith; (iii) an implied duty of confidentiality; and (iv) an express confidentiality provision in the Settlement Agreement (JA524-37). Chemical's Answer, among other matters, denied that it breached any contract, express or implied (JA538-53).

In May 1989, Petitioners announced an increase in the damages they sought to recover (from $60,000,000 to $80,000,000) based on unsupported calculations, which they characterized as "preliminary in nature" (JA560-62). Petitioners stated further that they "reserve the right to rely upon *alternative* damage calculations at trial" (JA562; emphasis added).

On October 3, 1989, in their portion of the Joint Pretrial Order ("JPTO"), Petitioners committed to their final damage

---

[6] The Petition contains irrelevant and scandalous statements, whose only purpose is to sway this Court against Chemical and the courts below. These assertions include, among other things, false allegations of "blackmail" that were, in any event, rendered irrelevant by the Release and baseless statements that the courts below repeatedly harassed Petitioners (Petition at pp.30, 62). These specious statements are irrelevant to the questions presented by the Petition and, accordingly, are not specifically addressed herein.

[7] In September 1989, Petitioners sought to reargue a portion of the District Court's decision in *Sharma I*. The District Court reaffirmed its ruling in *Sharma II*, 723 F.Supp. at 201.

calculation, which was based solely on the alleged loss of future earnings from the Vessels (JA1263-65, 1280-81).[8] Within two days of receiving this calculation (along with Petitioners' trial brief, their expert affidavits, and answers to a second set of interrogatories) and in anticipation of the final pretrial conference scheduled for October 6, 1989, Chemical alternatively asked the District Court to enter summary judgment, a directed verdict, or rule, *in limine*, to exclude, among other things, alleged evidence of lost profits (JA1550-61).

Contrary to Petitioners' claim that they had "no opportunity to respond to Chemical's motion," Petitioners submitted written materials in opposition to that motion at the October 6, 1989 pretrial conference (JA1594, 1599, 1562). Following the conference, Petitioners' counsel submitted three further letters to the District Court in response to the issues raised by Chemical's motion (JA1563-66, 1614-17, 1618-25).

The District Court treated Chemical's request *only* as a motion *in limine* and, at the adjourned final pretrial conference on October 11, 1989, struck a number of Petitioners' proposed findings, including proposed findings on damages (JA1631, 1635-36, 916 F.2d at 824).[9] With regard to damages, the District Court stated that the sole measure of recovery was the market value of the Vessels at the time they were transferred to Chemical's nominees and that lost future earnings from the Vessels were not recoverable as a matter of law (JA1637-38, 916 F.2d at 824).

---

[8] Given Petitioners' refusal to commit to their final damage theory and calculation until the JPTO was filed (eight business days before trial), their assertion that "Chemical had known for over two years that plaintiffs were seeking lost profits" is untrue (Petition at p.16, n.*).

[9] The court explained that "most of these matters, if not all of them, have been discussed by the parties in their trial briefs and or letters to the court during the past recent period" (JA1632) and that Petitioners' answers to the second set of interrogatories, expert affidavits and proposed findings of fact "required" the rulings which were made (JA1664).

All other evidentiary issues raised by Chemical were expressly reserved until trial (JA1636), and the District Court informed Petitioners' counsel that he could present their case within the legal limits set by the *in limine* rulings (JA1638).

At the continued pretrial conference the following day, the District Court emphasized that it did not strike Petitioners' claims under their Fourth Amended Complaint (JA1649-50, 1652-53, 916 F.2d at 824). The court did, however, reiterate that lost prospective earnings from the Vessels was not a proper measure of damages (JA1654-55, 916 F.2d at 824).

The District Court cogently explained the necessity for its *in limine* rulings concerning Petitioners' damage theory:

> One of the reasons why a proper damage calculation should be dealt with in limine in a case of this nature and complexity is that it avoids flooding the jury's ears with evidence which they may later have to be told to disregard. If a damage calculation is to be testified to by experts and displayed with the elaboration that this damage calculation has the jury can never be told effectively to disregard it when the evidence is stricken.
>
> Furthermore, it's unfair to the parties on both sides, in my judgment, to allow the effort of preparation and presentation of that much evidence to be undertaken in a direction which the law ultimately will hold to be futile and for all those reasons it seems to me a proper in limine ruling. It's not one I made simply to deal with a minor matter. I regard it as a major matter for the trial, one on which pretrial guidance was justifiably requested and should have been given as it was.

(JA1656)

Admitting that the market value of the Vessels at the time of the transfer to Chemical's nominees was less than the amount

owing to Chemical under the Settlement Agreement, Petitioners concluded that they could not recover any damages on their affirmative claims (JA1654, 916 F.2d at 824). Accordingly, they requested the District Court to enter a final judgment dismissing all of their claims pursuant to Fed.R.Civ.P. 54(b) (JA1648, 916 F.2d at 824-25).

On appeal to the Second Circuit, Petitioners primarily challenged the District Court's damage rulings as insupportable under New York law (916 F.2d at 825; Petition at p.18). The Second Circuit's principal holding was that, under well-established New York contract law, damages for the loss of the Vessels resulting from alleged breaches of the Settlement Agreement are limited to the market value of the Vessels at the time of the breaches (A1-2, 916 F.2d at 825-27). The Second Circuit also ruled that, because of its "disposition of the legal issues raised on this appeal, the various procedural errors claimed by [Petitioners] are moot" (916 F.2d at 828). Contrary to Petitioners' statement, the Second Circuit never ruled that "the failure to allow petitioners to be heard before dismissal" was error, harmless or otherwise (Petition at pp.32, 34).

On October 31, 1990, Petitioners filed a petition for rehearing (with a suggestion for rehearing *en banc*) addressed to the Second Circuit's ruling on the proper measure of damages.[10] There, the Petitioners urged, for the first time, that the state law "principle of recovery" was so critical that "the [Second Circuit] should have certified the issue to the New York Court of Appeals pursuant to McKinney's Revised 1990 New York Rules of Court §500.17(b)."[11]

By urging that the Second Circuit should have certified the question of the proper measure of damages, Petitioners

---

[10] In their petition for rehearing, Petitioners' untrue assertion that the District Court improperly granted summary judgment (which forms the basis of their Petition) was relegated to a brief footnote.

[11] This rule permits the Second Circuit, in its discretion, to request the New York Court of Appeals to certify a "determinative" question of New York law that is "not controlled by precedent."

necessarily conceded that a state law issue was "determinative" and that the Second Circuit properly held that all alleged procedural errors were moot. Moreover, the Second Circuit, which found ample New York precedent for its decision, clearly recognized that this issue did not merit the attention of the New York Court of Appeals.

SUMMARY OF ARGUMENT

Pretrial *in limine* rulings, which exclude evidence offered in support of a damage theory that is legally deficient under well-established state law principles, are procedurally correct under Fed.R.Civ.P. 16. Petitioners' election to abandon the claims set forth in their Fourth Amended Complaint, as a consequence of the dispositive damage ruling, did not transform *in limine* rulings into a grant of summary judgment.

The alleged federal questions presented by the Petition are utterly without foundation and concern an issue which is academic, episodic and of no public importance. Accordingly, the Petition should be denied.

REASONS FOR DENYING THE WRIT

1. Since the District Court Did Not Grant Summary Judgment to Chemical, the Questions Presented by the Petition are Academic and Without Foundation.

In their Petition, Petitioners seriously mischaracterize the form of relief granted to Chemical below and seek this Court's review of a ruling that was never made. By their misstatement that the District Court's evidentiary rulings were a grant of summary judgment and their misrepresentation that the Second Circuit found "harmless error," Petitioners frivolously attempt to create a federal issue where none exists.

At no time did the District Court make any findings of fact or rule on Chemical's alleged liability for the claims asserted in the Fourth Amended Complaint. The District Court specifically refused to grant Chemical summary judgment,

ruling that Petitioners were entitled to offer evidence of the alleged breaches of the Settlement Agreement at trial (JA1634-35).[12]

Instead, Petitioners concluded that they could not recover damages on a judgment of liability, since their future profits theory was untenable as a matter of law. Petitioners, therefore, requested the District Court to enter a final judgment dismissing all of their claims, pursuant to Fed.R.Civ.P. 54(b).

Before voluntarily abandoning their claims in the District Court, Petitioners were at liberty to proceed to trial on their Fourth Amended Complaint and the JPTO.[13] Petitioners' election not to do so did not transform the District Court's *in limine* rulings into an effective grant of summary judgment.

Thus, the purported federal questions presented by the Petition are "wholly without foundation," purely "academic," and do not merit this Court's attention. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955); *New Orleans v. New Orleans Waterworks Co.*, 142 U.S. 79, 87 (1891).

The District Court's sound exercise of discretion to exclude legally insufficient evidence on the specific facts of this case is hardly a question for review by this Court, particularly since the receipt of evidence by a trial court lies largely within its discretion and will ordinarily not be disturbed unless manifestly

---

[12] The District Court's refusal to rule on the merits of Petitioners' claims, among other things, distinguishes this case from *Brobst v. Columbus Services International*, 761 F.2d 148, 153-54 (3d Cir. 1985), *cert. denied*, 483 U.S. 1043 (1988). In *Brobst*, the Third Circuit held it was error for the court below to use defendant's motion *in limine* to resolve disputed issues of fact and to rule on the merits of plaintiff's claim on grounds not asserted in the motion. In this case, the District Court ruled on a pure legal issue regarding the appropriate measure of damages in a breach of contract action.

[13] This case is clearly distinguishable from the cases cited by Petitioners in which trial courts expressly granted a motion for summary judgment or converted a motion to dismiss into a motion for summary judgment without providing sufficient notice to the non-moving party.

erroneous. *Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962); *see also Proteus Books Ltd. v. Cherry Lane Music Co.*, 873 F.2d 502, 514 (2d Cir. 1989); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 308 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *Miller v. New York Produce Exchange*, 550 F.2d 762, 769 (2d Cir.), *cert. denied*, 434 U.S. 823 (1977).

Fed.R.Civ.P. 16 expressly grants the District Court the authority and discretion to make pretrial *in limine* rulings, which formulate and simplify the issues for trial and exclude inadmissible evidence and unnecessary proof. *Life Music, Inc. v. Broadcast Music, Inc.*, 31 F.R.D. 3, 6-7 (S.D.N.Y. 1962); *American Machine & Metals, Inc. v. De Bothezat Impeller Co.*, 82 F.Supp. 556, 558 (S.D.N.Y. 1949), *aff'd*, 180 F.2d 342 (2d Cir.), *cert. denied*, 339 U.S. 979 (1950); *Yale Transport Corp. v. Yellow Truck & Coach Mfg. Co.*, 3 F.R.D. 440, 441 (S.D.N.Y. 1944); *Baskett v. United States*, 2 Cl. Ct. 356, 359-60, *aff'd*, 790 F.2d 93 (Fed. Cir. 1986); *see also United States Football League v. National Football League*, 634 F.Supp. 1155, 1165 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988).

A motion *in limine* is an appropriate procedural device to determine the proper measure of damages. *Gilbert v. Pan American World Airways, Inc.*, No. 85-4157 (S.D.N.Y. Feb. 23, 1989 and July 8, 1988) (available on Westlaw, 1989 WL16603 and 1988 WL74987); *Schuman v. Mezzetti*, 702 F.Supp. 52, 54 (E.D.N.Y. 1988); *North American Foreign Trading Corp. v. Direct Mail Specialist*, 697 F.Supp. 163 (S.D.N.Y. 1988); *White Mountain Apache Tribe v. United States*, 10 Cl. Ct. 115 (1986).

The District Court's *in limine* rulings properly struck the specific paragraphs of the JPTO that asserted or supported a legally deficient theory of damages. In issuing these advance rulings on the admissibility of evidence, the District Court implemented the precise goals of Fed.R.Civ.P. 16.

Not surprisingly, Petitioners have cited no authority to suggest that, by making and upholding these evidentiary rulings, the courts below so far departed from the accepted and usual

course of judicial proceedings (or sanctioned such a departure) as to call for an exercise of this Court's power of supervision. Indeed, taken to its logical conclusion, Petitioners' attempt to transform *in limine* rulings into a constitutional question would eviscerate Fed.R.Civ.P. 16 and strip all trial judges of their ability to determine the legal standard of damages that would apply in a breach of contract action.

2. The Pivotal Ruling of the Second Circuit On a Matter of State Law Was Clearly Correct.

The determinative holding by the Second Circuit, based on New York State Court of Appeals precedent, was:

> It is a fundamental proposition of contract law, including that of New York, that the loss caused by a breach is determined as of the time of breach. *See Simon v. Electrospace Corp.*, 28 N.Y.2d 136, 145, 269 N.E.2d 21, 26, 320 N.Y.S.2d 225, 232 (1971). It is also fundamental that, where the breach involves the deprivation of an item with a determinable market value, the market value at the time of the breach is the measure of damages. *See id* at 145-46, 269 N.E.2d at 26, 320 N.Y.S.2d at 233.

916 F.2d at 825 (footnotes omitted).

In affirming the District Court's evidentiary ruling, the Second Circuit correctly reasoned that the damage rule espoused by Petitioners would be wholly inconsistent with New York contract law and long-established precedent of this Court limiting damages for the loss of Vessels to their value on the date of the loss. 916 F.2d at 825-27; *see also The Umbria*, 166 U.S. 404, 421 (1896); *DiMillo v. Sheepscot Pilots Inc.*, 870 F.2d 746, 751-52 (1st Cir. 1989); *Albany Insurance Co. v. Bengal Marine, Inc.*, 857 F.2d 250, 253 (5th Cir. 1988); *King Fisher Marine Service, Inc. v. N.P. Sunbonnet*, 724 F.2d 1181, 1187 (5th Cir. 1984).[14]

---

[14] Petitioners inaccurately state that the Second Circuit's ruling is "directly contrary to the holdings of four recent decisions of the New York Court of

(Footnote continued)

Where, as here, judgments of lower federal courts sitting in diversity are based on application of state law principles, this Court routinely declines to review the state-law question. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 816, n.12 (1984); *Butner v. United States*, 440 U.S. 48, 58-59 (1979); *Bishop v. Wood*, 426 U.S. 341, 346-47 (1976); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 534 (1949).

As this Court stated in *Butner*:

> In this Court the parties have argued the state-law question at great length, each stressing different aspects of the record. We decline to review the state-law question. The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues.

Butner, 440 U.S. at 58-59 (footnote omitted).

Because the Second Circuit thoroughly considered and correctly decided the determinative issue of state law upon which its opinion was based, an exercise of this Court's discretion to entertain the Petition is wholly unnecessary.

3. The Petition Does Not Present An Important Question of Federal Law.

Without any suggestion of a dispute among the circuits concerning the application of this Court's holdings in *Matsushita*

Appeals" (Petition at p.33). Petitioners brought three of the four cases cited in the Petition to the attention of the Second Circuit, which found that Petitioners "have not led [it] to any New York authority that even remotely undercuts the numerous contrary precedents" cited in its opinion (916 F.2d at 825-26). The fourth case, *American List Corp. v. U.S. News and World Report, Inc.*, 75 N.Y.2d 38, 549 N.E.2d 1161, 550 N.Y.S.2d 590 (1989), is similarly distinguishable from the case at bar. Pursuant to the express terms of the *American List* contract, the defendant promised to pay lost profits. Here, nothing in the Settlement Agreement even remotely suggested that lost profits were contemplated by the parties as damages for a breach (JA188-99; *see also* 916 F.2d at 827).

Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), Petitioners would have this Court re-examine these prior rulings in a case where summary judgment was *not* granted and the Second Circuit held that all alleged procedural errors were moot.

Even if this case did involve a meaningful question of federal law, which it does not, Petitioners have not cited any authority to demonstrate a conflict between circuit courts (or between a federal court of appeals and a state court of last resort) with respect to the rulings by the courts below. Nor have Petitioners demonstrated that the "academic" issues presented by the Petition are likely to have continuing future consequences.

This case does not involve unsettled principles of importance to the public. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). Petitioners simply seek review for their particular benefit. *See Rice*, 349 U.S. at 74. Under these circumstances, the questions presented by the Petition are not important questions of federal law and do not require review by this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: February 13, 1991

HENRY LEWIS GOODMAN
Counsel of Record for Respondent Chemical Bank
Third Avenue
New York, New York 10017
(212) 682-6900

Of Counsel:
Margot B. Schonholtz, Esq.
Zalkin, Rodin & Goodman